SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1967
No. 371
No. 347

LOUIS NASH
Petitioner
v.
THE STATE OF FLORIDA
Respondent
MALCOLM ROBERTS
Petitioner
v.
THE STATE OF FLORIDA
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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OPINIONS BELOW

The Opinions of the Third District Court of Appeal and Orders of the Supreme Court of the State of Florida are adequately set out in the appendices to petitioners' briefs.

JURISDICTION

The Court's lack of jurisdiction will be made to appear under the argument section of this brief.

QUESTIONS PRESENTED

Petitioners have presented certain questions as being appropriate for consideration by the Court. Without doing violence to their position, it is respectfully submitted that the issues might be more appropriately considered if the questions were rephrased as follows:

I

WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C., SECTION 1257?

II

WHETHER PETITIONER NASH WAS DEPRIVED OF. DUE PROCESS BY THE ADMISSION INTO EVIDENCE OF THE CONFESSIONS OF CO-CONSPIRATORS?

III

WHETHER THERE WAS ANY EVIDENCE INDICATING PETITIONER NASH'S PARTICIPATION IN A CONSPIRACY TO COMMIT GRAND LARCENY?

IV

WHETHER THE THIRD DISTRICT COURT OF APPEAL DENIED PETIT-

IONERS NASH DUE PROCESS UNDER THE LAW OF THE STATE OF FLORIDA RELATING TO THE CRIME OF CONSPIRACY WHEN IT HELD IN AFFIRMING HIS CONVICTION OF CONSPIRACY TO COMMIT GRAND LARCENY, THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION AND AT THE SAME TIME REVERSED HIS CONVICTION OF GRAND LARCENY ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT?

V

WHETHER PETITIONER ROBERT'S CONFESSION WAS PROPERLY ADMITED INTO EVIDENCE?

STATUTES INVOLVED

With the exception of Section 776.011 Florida Statutes, all pertinent Statutes and Constitutional Provisions are included in Petitioners' Brief.

"776.011 Principal in first degree. — Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commision of such offense."

STATEMENT OF THE CASE

Appellants Nash, Rosen, and Roberts were convicted of the crimes of conspiracy to commit grand larceny and grand larceny (R 990-994).

On March 24, 1964 (R 36), William Ivey of the State Beverage Department and Woodrow Gardner, a paid informer (R 31), inquired of one Petrocine whether he could furnish a load of whiskey to take to Jacksonville (R 39). Petrocine introduced Gardner to Nash (R 19). Nash asked Gardner if he could use one thousand cases of scotch (R 25). Gardner agreed to purchase the scotch (R 25).

On March 30, 1964, Ivey represented to Petrocine that he could not find Gardner and that he wished to do business (R 42). The following evening Petrocine told Ivey that Nash was going to make arrangements for the whiskey. On April 2, 1964, Nash told Ivey to return on April 6 and that they would then discuss the price and down payment (R 47).

On April 6, Nash advised Herman Fugate, a State Beverage Agent (R 56), and Gardner that the whiskey was "Hot" (R 63). On April 7, Nash informed Gardner that he had to purchase 1000 cases or nothing (R 70).

On or about April 12, one Jack Shea requested Roberts to contact Rosen to set up a business deal (R 648). Roberts called Rosen and said that he knew Rosen was in financial difficulty, and that he knew Rosen haulded a lot of liquor. Rosen was owner of Allapattah Transfer. Roberts then asked Rosen if he would like to make some money (R 415). A meeting was arranged between Rosen and Jack Shea (R 415). A few days later Rosen met Shea and advised

him that he would have approximately 1000 cases of liquor in his warehouse (TT 417). Subsequently, Roberts phoned Rosen to advise that they thought they could do it. Later Rosen met with Shea and Roberts at Tyler's Restaurant and was told that he could get $10,000 for his share of the deal (R 423). Rosen agreed to contact Roberts when they had some liquor in the warehouse (R 424). On April 14, Rosen called Roberts to say that they could go ahead with the deal (R 651). That evening Nash visited the home of Jack Shea (R 516).

On April 15, Rosen told his driver to go to the docks and load 1000 cases of a shipment of scotch for delivery to Austin Nichols, a local liquor distributor (R 426, 427). The truck with the whiskey was placed in the warehouse at about 4:30 that afternoon (R 435). The keys were left in it (R 436).

On the evening of April 15th, Rosen met with Shea and Roberts and gave Shea the keys to the warehouse (R 428). Rosen and one Rick, drove around for awhile and waited in Rosen's car. Rick directed Rosen to the vicinity of the Anchorage Bar where they parked. After a while Shea got in the car and gave Rosen back the keys and said the man is on the way with the money (R 433).

Meanwhile, on April 15, Ray Frederick, a State Beverage Agent, and Grafton Gray, an underworld figure who was working with the beverage agents, went to Nash's house (R 732). Nash, Frederick, and Gray went to 27th Avenue where State Beverage Agent Finley and Williams, posing as liquor law

violators, were waiting. These agents had the money for the whiskey (R 733). Nash told Frederick and Gray to signal Finley and Williams to follow (R 733). Nash directed the officers to the Anchorage Tavern (7 733). Nash got out of the car and talked to two white males in front of the tavern (R 734). These white males were Shea and Rick (R 434, 437). Nash then told Williams the whiskey was in the truck (R 734). Williams got in the truck. Shortly thereafter, Williams told Gray that the truck contained 1000 cases. Gray told Williams to go get the money. Williams obtained a leather bag with handles on it from Finley. The bag contained the money (R 735). The serial numbers of the bills had been recorded by the State Beverage Agents (R 832). The money in the bag had also been fixed, that is, some of the bundles of money were sandwiched with one dollar bills (R 852). Nash then told Williams to get in the truck and start it (R 735). Williams reported that there were no keys in the truck. Nash then went back to the tavern, talked with a white male, and returned with the keys. Williams drove the truck away. Nash said, "We better get out of here. That whiskey is pretty hot." (R 736). Nash then went back to the tavern and left the bag of money inside (R 736, 737). Thereafter, Frederick and Gray took Nash home and parted company (R 737).

In the meantime, Shea, Rick, and Rosen had gone to the tavern. Shea told Rosen to go inside and not to associate with them (R 437). Shea and Rick came in after Rosen (R 437) and began to play pool. After a while, Shea and Rick walked outside and came back carrying a satchel (R 438, 440). Shea, Rick, and

Rosen got in Rosen's car and they left (R 440, 441). Shea discovered that some of the bundles contained all one dollar bills (R 441). Rosen took Shea and Rick back to the restaurant where he had met them that evening (R 447). Later that night, Rosen received a call from Roberts to the effect that "the boys" were on their way to Palm Beach, and that they were "going to wait for the guy who was supposed to be buying the whiskey" (R 448).

Rosen's secretary, Pat Yoder, discovered the truck load of whiskey to be missing at 7:20 on the morning of April 16 (R 757). She called the police (R 157.

Roberts called Rosen early in the morning on the following Thursday. Rosen told him that he was desperately in need of money. Roberts said, "Well, I'll see what I can do. I'll tell these guys you got to have some money." Rosen further advised that he was meeting "them" downtown in the morning (R 450).

Roberts met Shea at the Justice Building. Shea gave Roberts a bag with $1000 in cash (R 652).

That same morning, Rosen called one Howard Bressler, owner of the Imperial Bar. Rosen told Bressler that someone was going to drop some money off (R 259). Later, Roberts gave Bressler a leather bag with money in it (R 259). Roberts told Bressler it was for Rosen (R 260). Bressler called Roberts and reported that the money had been delivered. Rosen told Bressler to keep $200 in payment of a debt owed Bressler by Rosen on a bad check, to give Rosen's secretary, Pat Yoder, $200, and to deposit $300 in

Bressler's bank account (R 261). Rosen authorized Roberts to keep $300 for himself (R 452).

Bressler gave Pat Yoder $200 plus the leather bag (R 261, 160). Bressler told Pat Yoder to throw away the leather bag or get rid of it (R 162). When she later mentioned to Rosen that she still had the leather bag, Rosen told her to "get rid of it. Get rid of it fast." (R 164).

The next day, Friday, Rosen asked Bressler for the $300 Bressler had deposited. Bressler withdrew the money from the bank and gave it to Rosen. Rosen gave Bressler a check for $500. Rosen owed Bressler $200 because a previous check had bounced. Rosen said, "In case somebody was to say something, where I got the money from, just hold the check for me and say that I borrowed it from you." (R 262).

William Powers of the Sheriffs Office examined the lock on the warehouse. He stated that it did not appear that the lock had been forced (R 264), although there were superficial (R 255) jimmy marks on it (R 247). Deputy Powers was of the opinion that entry was not gained by forcing the lock (R 254). Detective Rein made the same observation (R 399).

Meanwhile, beginning on April 15, prior to the larceny and on two occasions after the larceny, Nash visited the home of John Gray in West Palm Beach. Gray was not at home and Mrs. Gray gave Nash $600 on his first visit and told him that her husband had left town. The next morning at about 1:00 Nash and four or five other men went Gray's home and in-

quired as to Gray's whereabouts (R 686). Nash was upset because Gray had not given him the right amount of money (R 687, 688). On the third visit, Nash told Mrs. Gray that the men who had been with him on the previous night had wanted to take her and the children from the house, but that he wouldn't let them (R 689). Nash made several phone calls to the same effect.

Nash was arrested on April 17 (R 709). The serial numbers of the currency that he had in his wallet (R 462) at the time of his arrest (R 473-475) corresponded with the serial numbers (R 558, 560, 561) of the bills that the beverage agents had previously recorded (R 560). The record does not reflect whether these bills were used in the purchase of the whiskey or given to Nash by Mrs. Gray.

Roberts and Rosen were arrested (R 405). Roberts made a statement, which was admitted into evidence, concerning his participation in setting up the meeting between Rosen and Shea and his delivery of the money to Bressler (R 646-654). Rosen likewise made a statement, which was admitted into evidence, concerning his participation in the crimes charged (R 412-459).

Nash again referred to the whiskey as being "hot" during a telephone conservation to Gardner (R 829).

ARGUMENT

POINT I

THE COURT HAS NO JURISDICTION UNDER TITLE 28, U.S.C. SECTION 1257.

It is essential to the jurisdiction of the United States, Supreme Court under Title 28, U.S.C. Section 1257, that a substantial Federal question has been properly raised in the State Court proceedings, *Beck v. Washington,* 369 U.S. 541 The Petition for Writ of Certiorari filed on behalf of Petitioner Nash, alleges a denial of due process from the admission into evidence of an alleged co-conspirator's incriminating statement and a denial of due process due to an alleged insufficiency of evidence. It is conceded that throughout all of the State Court proceedings, Petitioner Nash has asserted the alleged insufficiency of evidence. However, it is apparent on the face of the record that petitioner Nash raises, for the first time, the question of a deprivation of due process due to the admission into evidence of a co-conspirator's incriminating statement in the Petition for Writ of Certiorari filed before this Court.

This is apparent from the record. The record (R 953) reflects that "upon stipulation of respective counsel, the Court ordered the above-styled and numbered case consolidated for the purposes of trial." The record also reflects that no mention of this alleged deprivation of due process is contained in petitioner Nash's Motion for New Trial (R 986, 987). Petitioner Nash's Assignments of Error are equally silent in this regard (R 998-1000). The Petition for Rehearing filed before

the Third District Court of Appeal of Florida also contains no mention of this alleged wrong-doing on the part of the Trial Court. The Opinion of the Third District Court of Appeal states as follows:

> "On this appeal, the appelant raises three points. The first point questions the sufficiency of the evidence to support the conviction of conspiracy to commit grand larceny. The second point questions the sufficiency of the evidence to support the conviction for grand larceny. The third point questions the sufficiency of the evidence as to both counts because of the claimed failure of the State to prove lack of consent on the part of the owner of the property which was stolen." 188 So.2d 391.

The Petition for Writ of Certiorari to the District Court of Appeal Third District contains no mention of this question. Thus, it must be concluded that Petitioner Nash, prior to this time, has never raised this question in any State Court.

Surely this Court does not regard the question of the sufficiency of the evidence to support petitioner's conviction for conspiracy to commit grand larceny as being a substantial Federal question. At least it should not regard this question as being substantial as long as there is some evidence which can support the verdict. Were this not the rule, this Court would be just another appellate court.

POINT II

PETITIONER NASH WAS NOT DEPRIVED OF DUE PROCESS BY ADMISSION INTO EVIDENCE OF THE CONFESSION OF A CO-CONSPIRATOR.

The record reflects that any references to petitioner Nash in Rosen's confession were deleted with the State's concurrence. (R 443). Rosen's confession was, therefore, free of any reference to petitioner Nash with the possible exception of a statement that" . . . this looks like that guy Lou's car," which was apparently overlooked by the Clerk. (R 443).

Robert's confession (R 646-654) contains absolutely no reference to Petitioner Nash. In *Paoli v. The United States*, 352 U.S. 232, it was held:

> "If Whitley's confession had included no reference to petitioner's participation in the conspiracy, its admission would not have been open to petitioner's objection. Similarly, if the trial court had deleted from the confession all references to petitioner's connection with the conspiracy, the admission of the remainder would not have been objectionable."

As is apparent from the above, Robert's confession contained no reference to Petitioner Nash's participation in the conspiracy. Again, as pointed out above, all references to Petitioner Nash's connection with the conspiracy were deleted from Rosen's confession with the exception of the rather obscure reference "This looks like that guy Lou's car."

> The Court in its charge to the jury instructed that ". . . you are instructed that you must consider the confession or statement only in connection with the guilt or innocence of the defendant who gave or made the same, and that you must not consider it in connection with the guilt or innocence of other defendants." (R 894)

It is respectfully submitted that the sole reference to petitioner Nash was so oblique as to preclude any possible prejudice. It is also respectfully submitted that the Court's charge to the jury was sufficiently clear to dispel any hint of prejudice. Therefore, petitioner Nash was not deprived of due process by admission of the evidence of the confession of co-conspirators. *Paoli v. The United States, supra.*

POINT III

THERE WAS AMPLE EVIDENCE INDICATING PETITIONER NASH'S PARTICIPATION IN THE CONSPIRACY TO COMMIT GRAND LARCENY.

It cannot be doubted that a conspiracy to commit grand larceny was in existence. Once the existence of a conspiracy has been established, slight evidence connecting the accused therewith will suffice, and it is not necessary to connect him directly with the actual crime. 15A C.J.S. Conspiracy, Section 93, pages 1152-1156.

It is respectfully submitted that the evidence is sufficient to sustain Nash's conviction of the crime charged.

Nash agreed to sell one thousand cases of scotch whiskey to the beverage agents. At that time Nash advised the agents that the whiskey was "hot". Nash visited the home of Shea at 10:30 on the night before the larceny. (R 516). Nash directed the beverage agents to the Anchorage Bar and also directed the exchange of money for the truckload of whiskey. Nash again advised the agents that "we better get our of here. That whiskey is pretty hot." Nash left the money inside the tavern. Bills which had been previously marked by the beverage agents were found in Nash's wallet at the time of his arrest. After the larceny, Nash, on two occasions, went to the Gray home in an effort to collect the money. Nash made phone calls to the same effect.

It is respectfully submitted that this evidence is sufficient, standing alone, to connect Petitioner Nash with conspiracy to commit grand larceny. Nash's characterization of the whiskey as "hot" indicates that Nash knew the whiskey had been stolen. The word "hot" is synonymous with "stolen" and is a thief's word for "stolen". *United States v. Nelson,* 185 F2d 758, 760; *United States v. Rappy,* 157 F2d 964, 966.

Nash's visit to the home of Jack Shea, the actual perpetrator of the grand larceny, on the evening before the crime, was also evidence on which the trier of fact could rely in tying Nash to the conspiracy. The fact that Nash was able to direct the beverage agents to the rendezvous point with the thieves at the Anchorage Bar

and that he was able to direct the exchange of money in a manner worthy of a spy thriller, discloses prior liaison and coordination with the thieves. The fact that money which was handed over to the theives at the rendezvous was later found in Nash's pocket shows a contact with the thieves and with the conspiracy. Nash's visit to the home of the beverage agent, Gray, is significant. Nash was upset because Gray had not given him the right amout of money. The Court will recall that this money was delivered to the thieves. This fact also shows that after the larceny, Nash had some contact with the thieves. As pointed out above once the conspiracy was shown to exist, slight evidence is all that is needed to connect Nash with the conspiracy. (15A C.J.S. Conspiracy, Section 93, pages 1152 through 1156.) It is, therefore submitted, that the above evidence, standing alone, is sufficient to connect Nash with the conspiracy to commit grand larceny.

The above evidence does not stand alone. The Court's attention is directed to State's Exhibits 8, 10 and 11, consisting of photographs of a truck with the name Moredock Leasing painted thereon. Moredock Leasing is a local truck rental agency. Nash contends that he did not know that the whiskey was stolen. Can this contention stand in the face of the fact that Nash did not merely sell the beverage agents one thousand cases of scotch whiskey, but also transferred to their possession, with no instruction as to the disposition to be made thereof, a truck which obviously had been rented from a truck rental agency. The agents were not told that they must unload the truck and return it to Nash

or to any other person. For all the record shows, the agents were free to dispose of the truck as they pleased.

It is respectfully submitted that this fact shows beyond any shadow of a doubt that Nash knew that the whiskey had been stolen. This fact, when taken in connection with the facts outlined above, is more than sufficient to to tie Nash to the conspiracy to commit grand larceny.

POINT IV

THE THIRD DISTRICT COURT OF APPEAL DID NOT DENY PETITIONER NASH DUE PROCESS UNDER THE LAW OF THE STATE OF FLORIDA RELATING TO THE CRIME OF CONSPIRACY WHEN IT HELD, IN AFFIRMING HIS CONVICTION OF CONSPIRACY TO COMMIT GRAND LARCENY, THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION AND AT THE SAME TIME REVERSED HIS CONVICTION OF GRAND LARCENY ON THE GROUND THAT THE EVIDENCE WAS INSUFFICIENT?

Petitioner Nash very logically argues that because the Third District Court of Appeal held that the evidence was insufficient to support his conviction of grand larceny. the evidence must also be insufficient to support

petitioner's conviction of conspiracy to commit grand larceny. Respondent agrees that the opinion of the Third District Court of Appeal is illogical. But this is a sword that cuts two ways. Respondent has always contended, that if the evidences was sufficient to convict of conspiracy to commit grand larceny then the conviction of grand larceny should have been affirmed. (See respondents cross petition for writ of certiorari filed in the Florida Supreme Court.)

The law in Florida is well settled that when two or more people enter into a conspiracy to commit an unlawful act, each must take the risk of being bound by the action of the others taken or done in the futherance of the perpetration of that particular act, so long as the conspiracy lasts. *Strickland v. State* (Fla. 1936) 165 So. 289. *Tucker v. State* (Fla. 1930) 131 So. 327. Such an individual is a principal in the unlawful act even though he was not physically present during the perpetration of the act. Section 776.011 Florida Statutes *Prather v. State* (Fla. App. 1966) 182 So.2d 273.

It is respectfully submitted that if the evidence was sufficient to connect Nash with the conspiracy to commit grand larceny he must also, under the laws of Florida, be guilty of the crime of grand larceny. Therefore, while the Third District Court of Appeal may be faulted for it's knowledge with respect to the law of conspiracy, it certainly may not be accused of denying Nash due process of law. If anything, it gave Nash a "gift horse". Nash is now requesting this Court to look into the horse's mouth.

POINT V

PETITIONER ROBERT'S CONFESSION WAS PROPERLY ADMITTED INTO EVIDENCE.

The facts surrounding the statement, as reflected by the record before the Third District Court of Appeal, were as follows: Detective Kogan, Dade County Sheriff's Office advised Roberts that he did not have to tell anything and that anything he did tell would be used in court against him (R 566, 574). Detective Kogan advised Roberts that he had better secure a lawyer and bondsman (R575). Mr. Norman Haft, the attorney who represented Roberts at the trial, appeared (R 577). Mr Haft had a conversation with Roberts (R 593).

Roberts testified that Detective Rein threantened to "put him through the wall" (R 614). However, he stated that he did not answer any questions even though Rein allegedly threatened to "put him through the wall" (R 614). Gertrude Prau, the stenographic reporter for the Dade County Sheriff's Office, who took Roberts' statement, testified that at no time, in her presence, did Roberts complain that Detective Rein had brought him into a room and threatened to beat him up or push him through a wall (R 636).

At the end of the statement, which was given by Roberts, there appears the following:

" 'Question: Has this statement been made freely and voluntarily?

Answer: Yes

Question: Have you been made any promises?

Answer: No.

Question: Any threats made against you?

Answer: No.

MR. SANDSTROM: Thank you.' "

The day following the giving of the statement, Roberts talked to a Mr. Wolinsky, who was a friend of his. Mr. Wolinsky was the first man Roberts spoke to when he got out of jail. Roberts admitted that he did not mention the threats to Mr. Wolinsky (R 615). Based on these facts, the Third District Court of Appeal held as follows:

> The State does not contend that this testimony is directly refuted in the record. *However, it is urged that there was sufficient evidence before the court upon which it could have found that the confession was freely and voluntarily given.*
>
> We hold that *under the circumstances of this case* the testimony above quoted was not sufficient to require, as a matter of law, a finding by the trial judge that the subsequently given confession was involuntary." (Emphasis supplied) 188 So.2d 392 at 394.

CONCLUSION

Petitioner failed to raise a substantial Federal question in the Courts below. This Court is therefore without jurisdiction. The evidence was sufficient to support petitioner Nash's conviction for conspiracy to commit grand larceny and also for grand larceny itself. The deletion of all references to petitioner Nash in Rosen's confession and the absence of such reference in Robert's confession together with the Court's charge to the jury, preclude the possibility of any denial of due process by reason of the admission into evidence of the confessions of the co-conspirators.

There was no need to attempt to refute directly Robert's testimony as to the alleged threat by Officer Rein. The circumstances surrounding the confession were sufficient to discredit Robert's testimony in this regard.

Respectfully submitted,

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